

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.800 of 2001

In

Notice of Motion No.1762 of 2000

In

B.C.C.C.L.C.Suit No.2591 of 2000

1. Kakad Co Op Hsg Scy ..Appellant

V/s

1. The Municipal Commissioner
for Gr.Mumbai

2. The Municipal Corporation of
Gr.Mumbai

3. The Additional Collector and
Competent Authority (Urban Land
Ceiling) Gr.Mumbai

4.Murzban Nusserwanji Khariwala

5. Mrs.Manijeh Burjor Bandrawalla

6. M.R.P.Enterprises

7. Mrs. Renu M. Tilwani

8. White Orchid Co Op Hsg Scy Ltd

Mumbai

...Respondents

Mr.M.R.Irani with Mrs.Geeta Shashtri for Appellant

Mr.J.Xavier with Geeta Jogalekar for Respondent

no.1 and 2

Mrs Geeta Mulekar for Respodnent no.3

Mr.Vijay Kumar with Prashant Kulkarni i/b Zahir

and Co. for Respondent nos. 4, 5 and 6

Mr.P.K.Dhakephalkar for Respondent nos.7 and 8

CORAM :A.S.OKA, J.

DATED: 14th Feb. 2005

ORAL JUDGMENT :-

1. Heard Counsel appearing for the parties. Appeal is by the original plaintiffs for challenging the Judgment and order dated 4th April 2001 passed by the learned trial Judge by which Notice of Motion No.1762 of 2000 taken out by the Appellants plaintiffs has been dismissed.

2. It is not in dispute that during the pendency of this appeal, the order of this Court dated 17th January 2003 directing both the parties to maintain status quo is operating till today. During the pendency of the Appeal from Order No.360 of 2000

filed against the order refusing ad-interim injunction, an order dated 6th January 2000 was passed by this Court by which it was directed that it will be open to the Appellants to apply to the Respondent no.1 the Municipal Corporation for Greater Mumbai for getting copies of the sanctioned plan and documents with respect to the property developed. A statement of learned Counsel appearing for Respondent nos. 1 and 2 was recorded that on application being made by the Appellant with the necessary payment and particulars, the documents will be made available.

3. During the pendency of this appeal an order was passed on 5th June 2003 by this Court by which a statement was recorded of the learned Counsel for the Respondent nos.1 and 2 that on 12th June 2003 a senior officer from the Storm Water Department of the Respondent no.1 Mumbai Municipal Corporation will remain present in the Court along with original files. Accordingly the said officer remained present in the Court.

4. With a view to appreciate the submission made by the Counsel appearing for the parties it will be necessary to refer to facts of the case in brief.

. It is the case of the Appellant that Respondent nos.4 and 5 were the original owners of the plot

no.4, T.P.S.III, Pali Road, Bandra (West), Mumbai 400 050 admeasuring about 2676.86 sq.mtrs. The case of the Appellant is that on 27th February 1979 the Respondent nos.4 and 5 conveyed the entire property to M/s Kakad Investors and on the very day M/s Kakad Investors executed a lease deed in favour of Respondent nos.4 and 5 in respect of plot amdeasuring 1005.3 sq.mtrs for a period of 999 years. The said plot which is hereinafter referred to as the said plot is on the rear side of existing building of the Appellant society by name Kakad Apartments. The construction of the building of the Appellant society Kakad Apartments commenced some time in the year 1979 and building of ground plus six storeyed have been constructed. In the year 1996 the Respondent nos 4 and 5 assigned their leasehold rights in respect of the said plot in favour of the Respondent no.6. The Respondent no.6 started construction on the lease hold property after getting the building plan sanctioned from Respondent no.1 - Mumbai Municipal Corporation on 13th July 1996 and 10th June 1997. At that time various disputes were raised by Appellants in respect of permission granted to the Respondent no.6 for constructing a building. It is admitted position that notwithstanding objection raised by the Appellant, Respondent no.6 constructed a building consisting of 12 floors and Respondent no.8 is a Co operative housing society formed by

the flat purchasers of the said building known as White Orchid.

5. The Appellants filed a suit in the City Civil Court praying for various diverse reliefs. The first relief is as regards challenge to the permission granted for construction of White Orchid building. The second prayer is for revocation of the sanctioned plans and building permission. The next prayer is for removal of the said twelve storey building. There are further prayers made in the plaint. In so far as Notice of Motion is concerned, there were various reliefs claimed. It is noted in the impugned order that learned Counsel appearing for the Appellants made a statement that Appellants were not pressing prayer clauses (h), (i), (j), (k), (o), (p) and (r). Therefore in this appeal I am not concerned with the said prayers which are not pressed. The rest of the prayers in Notice of Motion reads thus :

(a) That pending the hearing and final disposal of the suit the defendant nos.1, 2, 4 5 and 6, by themselves, their officers, employees, workers and contractors be directed by a mandatory order and injunction to abate the nuisance of storm water flowing from the area surrounding the said 12 storey

building on stilts, on to the east and north side open spaces of the building known as Kakad Apartments and from accumulating and flooding it and also from flowing on to the underground water storage tank of Kakad Apartments, on the said property situate at Plot no.4, T.P.S.III, Pali Road,Bandra (West), Mumbai 400 050 bearing C.T.S.Nos. F/867 to F/869 admeasuring 2491-62 square meters i.e. 2980 sq.yards or thereabouts,more particularly described in Exhibit A to the plaint, wholly at their costs;

b) That pending the hearing and final disposal of the suit,Defendant nos.1 and 2 by themselves, their officers, employees, workers and contractors,be directed by a mandatory order and injunction of this Hon'ble Court to demolish and remove the illegally raised paved platform about one feet from ground level, constructed from the said Kakad sub station upto the gate on north west side of the building known as Kakad Apartments and to pave the said area at ground level of the said property, situate at Plot NO.4, T.P.S.III, Pali

Road, Bandra (West) Mumbai 400 050 bearing C.T.S. Nos.F/867 to F/869 admeasuring 2491.62 square meters i.e. 2980 square yards or thereabouts,more particularly described in Exhibit A to the plaint, wholly at their costs.

c) That pending the hearing and final disposal of the suit, the Defendant nos.4, 5 and 6 by themselves, their agents, architect, employees and workers be restrained by a permanent order and injunction of this Hon'ble Court from utilising the Floor Space Index of the staircase and balconies of the said ground plus six upper floors of the building known as Kakad Apartments along with its said one storey annexe on the said property situate at Plot no.4, T.P.S.III, Pali Road, Bandra (West) Mumbai 400 050 bearing C.T.S.Nos.F/867 to F/869 admeasuring 2491.62 square meters i.e. 2980 square yards or thereabouts,more particularly describe in Exhibit A to the plaint.

d) That pending the hearing and final disposal of the suit, the Defendant nos.4, 5 and 6 by themselves, their

agents, employees, workers and contractors be directed by a mandatory order and injunction of this Hon'ble Court to demolish the boundary walls illegally constructed on the east and north side of the twelve storey building on stilts known as "White Orchid", and its place to reconstruct the original boundary walls of about four feet in height wholly at their costs on the said property situate at Plot no.4, T.P.S.III, Pali Road, Bandra (West), Mumbai 400 050 bearing C.T.S.Nos.F/867 to F/869 admeasuring 2491 .62 square meters i.e. 2980 square yards or thereabouts, more particularly described in Exhibit A to the plaint;

e) That pending the hearing Aden final disposal of the Suit, the defendant nos.1 and 2 by themselves and their officers be restrained by an order and injunction of this Hon'ble Court from sanctioning the plans for demolition of the existing structure being used as a sub station and for the construction of a new structure to be used as a sub station on any portion of the said property situate at Plot NO.4, T.P.S.III, Pali Road, Bandra

(West), Mumbai 400 050 bearing C.T.S.Nos. F/867 to F/869 admeasuring 2491.62 square meters i.e. 2980 square yards or thereabouts, more particularly described in Exhibit A to the Plaint.

f) That pending the hearing and final disposal of the suit, Defendant nos. 4, 5 and 6 by themselves, their agents, employees, servants, workers and contractors be restrained by an order and injunction of this Hon'ble Court from demolishing the existing sub-station and from constructing a new structure to be used as a sub station on any portion of the said property situate at plot NO.4, T.P.S.III, Pali Road, Bandra (West) Mumbai 400 050 bearing C.T.S.Nos. F/867 to F/869 admesuring 2491.62 square meters i.e. 2980 square yards or thereabouts more particularly described in Exhibit A to the Plaint;

g) That pending the hearing and final disposal of the suit, Defendant nos.4,5 and 6, by themselves, their agents, employees, servants, workers and contractors be restrained by an order and injunction of this Hon'ble Court from in

any manner carrying on any further construction and/or further redevelopment of the said property situate at Plot no.4, T.P.S.III, Pali Road, Bandra (West), Mumbai 400 050 bearing C.T.S.Nos F/867 to F/869 admeasuring 2491.62 square meters i.e. 2980 square yards or thereabouts, more particularly described in Exhibit A to the plaint.

l) That pending the hearing and final disposal of the suit, the Defendant nos.3, 5 and 6 by themselves, their agents, employees, servants and Architect, be restrained by a permanent order and injunction of this hon'ble Court from claiming and/or representing themselves as owners of the said property situate at plot no.4, T.P.S. No.III, Pali Road, Bandra (West), Mumbai 400 050 bearing C.T.S.Nos. F/867 to F/869 admeasuring 249.62 square meters i.e. 2980 square yards or thereabouts more particularly described in Exhibit A to the plaint;

m) That pending the hearing and final disposal of the suit, the Defendant nos.1 and 2 by themselves and their officers be

restrained by an order and injunction of this Court from sanctioning plans for construction of additional floors above the building known as "Chateau Merdeka" by Defendant nos.4, 5 and 6 by themselves and their agents, employees, servants, workers and contractors on the said property situate at Plot NO.4 T.P.S.III, Pali Road, Bandra (West), Mumbai 400 050 bearing C.T.S.Nos. F/867 to F/869 admeasuring 2491.62 square meters i.e. 2980 square yards or thereabouts more particularly described in Exhibit A to the plaint.

n) That pending the hearing and final disposal of the suit, the Defendant nos.1 and 2 and their officers and employees be ordered and directed to measure the built up area of the said 12 storey building on stilts known as "White Orchid" and all other existing structures on the said property including the building known as Kakad Apartments and its one storey annexe and to compute the Floor Space Index/Transfer of Development of Rights consumed by said new twelve storeyed building on stilts in the presence of the plaintiffs and their duly appointed

Architect/s and to submit the report on an Affidavit disclosing the exact built up area and the Floor Space Index and Transfer of Development Rights consumed by the said 12 storey building on stilts known as "White Orchid" along with the Floor Space Index, consumed separately by all the existing structures on the said property situate at Plot No.4. T.P.S.III, Pali Road, Bandra (West), Mumbai 400 050 bearing C.T.S.No.F/867 to F/869 admesuring 2491.62 square meters i.e. 2980 square yards or thereabouts more particularly described in Exhibit A to the plaint';

q) That pending the hearing and final disposal of the suit the defendant nos.1 and 2 by themselves, their officers and employees be ordered and directed to furnish to plaintiffs the certified true copies of the sanctioned Building Proposal Plan bearing No.CE/414/WS/AH of 1996, other sanctioned Amended Building Proposal Plans, Commencement Certificate, Intimation of Disapproval, Proforma remarks, Chief Fire Officer and the Storm Water Drainage Department remarks and all other relevant

documents in respect of the Kakad Apartments along with its annexe and the said twelve storied building on stilts known as "White Orchid" on the said property situate at Plot no.4, T.P.S.III, Pali Road, Bandra (West), Mumbai 400 050 bearing C.T.S.No.F/867 to F/869 admesuring 2491.62 square meters i.e. 2980 square yards or thereabout more particularly described in Exhibit A to the plaint.

r) For ad-interim reliefs in terms of prayers (a) to (q) above;

s) For costs of this Notice of Motion;

t) For such other and further reliefs as the nature and circumstances of the case may require.

6. In so far as prayer clause (c) is concerned, the learned Counsel appearing for the Respondent no.6 has stated before me that till the disposal of the suit, the Respondent no.6 does not propose to carry out any further construction.

7. The prayer (a) in Notice of Motion is the prayer in respect of which main submissions have

been made before me. The main grievance of the Appellants appears to be that due to construction of the building White Orchid, in the monsoon there is flooding in the open space of the building Kakad Apartment and water is getting accumulated in the said building and open spaces thereof. In connection with prayer clauses (a), the prayer (b) is also relevant. The case of the Appellant is that while constructing the building White Orchid, from the Kakad electricity sub station upto the gate on North West side of the building known as Kakad Apartment a raised paved platform was constructed one foot above ground level. Therefore, prayer (b) has been made in the Notice of Motion for directing the Respondent nos 1 and 2 to remove illegally raised paved platform about one foot from ground level.

8. The learned Counsel appearing for the Appellant has invited my attention to various averments made in the plaint and in various affidavits on record. It must be noted here that at the time when Notice of Motion was heard, there was no municipal storm water drainage available on the road abutting the Kakad Apartment. The learned Counsel pointed out that due to accumulation of water, a child of one of the office bearers of Respondent no.8 society lost his life. He pointed out the correspondence made by the Appellants in that behalf. He

submitted that there was an under ground water storage tank of Kakad Apartment and due to slope of paved platform constructed by the Respondent no.6, the drain water is entering to the water tank of the Appellant.

7. In so far as the prayer clause (a) is concerned, the learned Counsel appearing for the Appellants submitted that if the paved platform constructed by the Respondent no.6 is ordered to be removed, the problem of water logging can be immediately resolved. In this connection it will be necessary to refer to a report on record dated 16th December 2001 submitted by the Executive Engineer (S.W.D.) WS Z III. The said Report reads thus:

"On inspection of the Kakad Aptt.s, it is observed that the plot under reference is a low-lying area about 2'.0" to 2'6" below the existing road level at Dr.Ambedkar Road hence flooding cannot be eliminated completely. Following steps are required to be taken to minimize flooding.

1. To raise the plot level of Kakad Aptt.s 0'-6" above the existing road level and sloping towards the road by the Society.
2. To raise the level of underground suction tank above the proposed ground

level by the Society. 3. To construct internal drain 0.45 mx 075 m. avg. depth and to connect it to the proposed drain with a catch pit chamber at point B on Dr.Ambedkar Road by the builder of White Orchids Society. a to B as shown in the block plan to also E to F. 4. The whole S.W. drainage arrangement and raising of plot level to be done in proper line and level and the same should be carried out by a competent Engineer. 5. There is a proposal to construct S.W.drain on DR Ambedkar Road by MCGB subject to availability of funds. C to D as shown in the block plan". There is a plan annexed to the said document. With a view to resolve the dispute between the parties, I made query to the Counsel for the Appellant and the Counsel for the Respondent no.8 that whether the parties were ready and willing to accept the suggestion made by the Executive Engineer and to take steps which are recommended in the report. The steps which are recommended by the Executive Engineer are for connecting the drains of both the buildings to the proposed storm water drain of the Respondent no. 1 Corporation. Now it is an admitted position before me that a Municipal storm water drain is now constructed on Dr.Ambedkar Road which is abutting Kakad apartments. The learned Counsel appearing for the Respondent no.1 on instructions of the concerned officers stated before me that now the municipal drain is very much

available and both the parties i.e. Appellants and Respondent no.8 can implement the suggestions made by the Executive Engineer.

8. The Counsel appearing for the Respondent no.8 stated that the Respondent no.8 was ready and willing to comply with the suggestions made by the Executive Engineer provided the appellants comply with the steps nos.1 and 2 mentioned by the Executive Engineer. The learned Counsel for the Appellants has, however, expressed his inability to accept the suggestions made by the Executive Engineer. Thereafter it is obvious that the dispute cannot be amicably resolved.

9. I have perused the averments in the plaint. It must be noted here that in so far as the plaint is concerned the averments relating to water logging in the property of Kakad Apartment are very vague and no material particulars are mentioned in the plaint whereby it is asserted that on a particular day or on particular dates there was a water logging in the premises of Kakad Apartment.

10. The learned Counsel for the Appellants has submitted that in case circumstances demand, the civil court can always pass mandatory directions at the interim stage and there is always a power to issue mandatory injunction at interlocutory stage.

There cannot be any dispute that such power does exist in the civil court.

11. The question before me is whether mandatory directions as sought in prayer clauses a) and b) can be issued pending the final disposal of the suit. As stated earlier, when the Notice of Motion was heard by the trial Court, there was no municipal storm water drainage arrangement made along the road abutting Kakad Apartments but now the said arrangement has been made. There are affidavits and counter affidavits on record. The pleadings in the plaint as regards water logging are general and vague. The question whether there is a frequent water logging in Kakad Apartment is required to be decided on evidence. If there is a frequent water logging problem faced by the residents of Kakad Apartment, the cause of water logging is a matter for concerned experts to decide whether the water logging is due to construction of platform by Respondent no.6 or not is a question to be decided on evidence at the trial of the suit.

12. Today when the suit is not yet ready for hearing, it is true that some interim arrangement is required to be made, if there is water logging in Kakad Apartment. There is a drastic change in the circumstances after impugned order is passed in the sense that municipal water drain is now

available to which the drains of both the buildings can be connected. The Executive Engineer of Respondent no.1 - Corporation has come out with concrete steps which can be taken for minimising the flooding in Kakad Apartments. Unfortunately the Appellants have not agreed to accept the suggestion of the Executive Engineer. In so far as a prayer clause (a) of Notice of Motion is concerned, it is to be noted here that prayer is for directing the Respondents no.1, 2, 4, 5 and 6 to abate the nuisance of storm water flowing from the area surrounding the said 12 storey building on stilts on to the east and north side open space of Kakad apartment and from accumulating and flooding it and also from flowing on to the underground water storage tank of Kakad Apartment. Even if the trial Court was to grant the said prayer, in my view, the same would have been improper. Such a prayer cannot be granted as it does not provide in what manner the alleged nuisance is to be prevented. If a relief is to be granted it should be capable of being enforced specifically.

13. In so far as paved platform is concerned, the learned Counsel for the Appellant submitted that there are breaches committed by Respondent no.6 while constructing the said building While Orchid. Mandatory order of demolition and removal of paved platform cannot be passed at interim stage because

several issues have to will have to be gone into after the recording of evidence. The learned Counsel for the Appellant has invited my attention to the various affidavits and in particular affidavit of one Shri A.C.Wade, Sub Engineer of the Respondent no.1 and pointed out that the said affidavit cannot be considered as officer was not authorised to file the same on the date on which it was affirmed. However, the said grievance is not material at this stage.

14. In my view, in so far as prayers (a) and (b) of the Notice of Motion are concerned, the same cannot be granted as evidence is required to be led before such prayers can be granted. For grant of interim mandatory prayers, a very strong prima facie case is required to be made out by the Appellants. As stated earlier the averments in the plaint are very vague as regards water logging and flooding. Therefore, I find no fault with the trial Court when the said prayers were not granted. The grant of relief of Temporary injunction is always discretionary. There is no reason to interfere with the exercise of discretion by trial Court as all relevant factors governing grant of such discretionary reliefs are considered by the trial Court. It is to be noted here that both the parties can still accept the suggestion made by the Executive Engineer of Respondent no.1 - Corporation

in his noting dated 16-12-2001 and take steps as suggested by the Executive Engineer.

15. In so far as other prayers in the Notice of Motion are concerned, as pointed out earlier, there is an order passed by this Court on 17th January 2003 directing both the parties to maintain status quo. The said order is operating till today. After having heard the Counsel appearing for the parties and after considering the other prayers in the Notice of Motion which are pressed I find that the order of status quo passed by this Court in favour of Appellants deserves to be continued till the disposal of the suit. The order of status quo, if continued, will take care of other prayers which are made in the Notice of Motion.

13. The grievance has been made by Counsel appearing for the Appellants that Respondent no.1 - Corporation has not furnished certified true copies of various documents in compliance with the order passed by this Court in earlier Appeal from Order when a statement of Counsel appearing for Respondent no.1 was recorded that necessary copies will be furnished to the Appellants. Today an affidavit has been filed by the Secretary of the Appellants setting out therein the details of certified copies of various documents furnished to the Appellants. It is also noted in the affidavit

that inspection of certain files is given by the Respondent no.1 to the Appellants. However, a grievance is made that certified copies of certain documents have not been furnished. The said documents are listed in Exhs C and F to the said affidavit. In my view, the Respondent no.1 -Corporation has complied with substantial part of the request made by the Appellants for supply of certified copies of the documents. If certified copies of some documents are not furnished to the Appellants it is for them to take out appropriate proceedings in that behalf.

14. Hence I pass the following order :-

i). Ad-interim order passed by this Court on 17th January 2003 directing the parties to maintain status quo will continue to operate till the disposal of the suit.

ii). In case the parties desire to accept the suggestions made by the Executive Engineer (SWD) Zone III of the Respondent no.1 Corporation in his report/noting dated 16th December 2001 the parties are free to apply to the trial Court so that necessary order can be passed by the trial Court for permitting the parties to take steps as suggested by the Executive Engineer.

iii). In so far as grievance regarding failure to supply certified copies of various documents made in the affidavit filed today is concerned, the remedy of the Appellants to take out appropriate proceedings in that behalf is kept open and therefore, no further directions are issued in that behalf.

iv). Considering the dispute involved in the suit the parties will be at liberty to apply to the learned trial Judge for expediting the final hearing of the suit.

v). It is obvious that the learned trial Judge will decide the suit on its own merits without being influenced by the impugned order as well as this judgment and order and all contentions of the parties on merits are kept expressly open.

vi). The appeal is disposed of in the above terms with no order as to costs.

vii) Certified copy expedited.

(A.S. OKA, J.)

